(18)

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 466 - 468

DANIEL S. GILLMOR, HENRY H. ABRAMS and PYRAMID COMMERCIAL CORPORATION, suing on its own behalf and on behalf of all other owners and holders of First Consolidated Mortgage 5% Gold Bonds, etc.,

Petitioners,

—against—

THE INDIANAPOLIS GAS COMPANY and CITY OF INDIANAPOLIS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

FRANK E. KARELSEN, JR.,
DONALD L. SMITH,
WALTER MYERS, JR.,
PAUL E. KERN,
Counsel for Petitioners.

COURT PRESS, 130 Cedar Street, N. Y. C.

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TABLE OF CASES CITED:

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DANIEL S. GILLMOR, HENRY H. ABRAMS and PYRAMID COMMERCIAL CORPORATION, suing on its own behalf and on behalf of all other owners and holders of First Consolidated Mortgage 5% Gold Bonds, etc.,

Petitioners,

—against—

THE INDIANAPOLIS GAS COMPANY and CITY OF INDIANAPOLIS.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The petitioners, Daniel S. Gillmor, Henry H. Abrams, and Pyramid Commercial Corporation, respectfully pray that a writ of certiorari issue to review the judgments of the United States Circuit Court of Appeals for the Seventh Circuit entered in the above entitled causes on the 10th day of June, 1943, affirming the judgments of the United States District Court for the Southern District of Indiana (R. 421). The actions were tried together in the District Court and the appeals were consolidated in the United States Circuit Court of Appeals (R. 408).

Statement of the Cases.

The petitioners are the holders of $12,000, $30,000 and $21,000, respectively, in principal amount of First Consolidated Mortgage 5% Gold Bonds issued by the Indianapolis Gas Company (hereinafter called the "Gas Company") (R. 87-89). They seek to recover from the Gas Company six years unpaid interest which accrued on their bonds at the rate of 5% per annum from April 1, 1936 to April 1, 1942, as evidenced by interest coupons attached to the bonds.

These bonds are part of an original issue of $6,881,000 issued by the Gas Company on and after October 1, 1902. Each of the bonds is in the principal sum of $1,000 and expressly provides for the payment to bearer of interest at the rate of 5% per annum in semi-annual installments until October 1, 1952, when the principal becomes due, without right of prepayment (R. 297-299). The bonds are secured by a mortgage dated October 1, 1902, conveying to trustees all of the then owned or after acquired property of the Gas Company (R. 295-313).

The Gas Company, admitting the validity of the bonds and that interest as provided therein, was not paid during the said six years, contends that the right of these petitioners to recover such accrued interest, or any interest in the future, has been destroyed by the consummation, on May 1, 1942, of an extra-judicial Plan. More than a majority of the Gas Company bondholders accepted this Plan and surrendered their bonds and coupons for cancellation pursuant to the Plan. It is contended that such action of the majority bondholders is binding upon all non-assenting bondholders under Article VII in the mortgage securing the bonds, and that the non-assenting bondholders are therefore relegated to the sole right to surrender their bonds for cancellation upon

payment of the sum of $1121.67 per bond, or approximately $240 less than was due thereon on April 1, 1942.

The action by petitioner, Pyramid Commercial Corporation, is brought on its own behalf and on behalf of all other bondholders similarly situated. The holders of more than $200,000 in face amount of said bonds have joined in this action. Before answering, the Gas Company impleaded the City of Indianapolis (hereinafter called the "City") as a third party defendant liable over to it.

Article VII of the mortgage, which the Gas Company contends authorizes the majority bondholders to cut off the minority's rights in their bonds against the obligor provides (R. 308):

> "VII. The action of the Trustees in regard to the enforcing to any extent or in any manner, the lien created by this mortgage, either by taking possession, sale at auction, or by resort to judicial proceedings, or by any means authorized and contemplated hereby, and any and every suit, bill or proceeding in equity, or other action which may in any manner be had or taken for enforcing the lien hereby created for the securing the payment of said bonds and coupons, or for enforcing any of the trusts of this instrument, shall be at all times subject to the control of the holders of a majority in amount of said bonds then outstanding, their wishes being expressed in writing.
>
> "And it is further agreed that in case of any proceeding as hereinbefore authorized by reason of any default that may have occurred and continued as aforesaid a majority in interest of the bondholders, for the time being, shall have the right to agree upon a plan or scheme for reorganization, which plan or scheme, when so agreed upon in writing and signed

by such majority in interest, shall be in all respects binding and obligatory upon all the holders of such bonds or coupons."

The Plan which, it is contended, was consummated pursuant to the authority in the above quoted provision of the mortgage, was framed and submitted by the Gas Company to its bondholders individually (R. 143-145). Neither the Trustee nor the bondholders collectively took any part in the preparation or submission of the Plan or in the consummation thereof. No proceeding had ever been undertaken by the Trustee to enforce the lien of the mortgage or to declare the principal due (R. 84).

The purpose of the Plan, as stated by the Gas Company to its bondholders, was to effect a settlement with the City with respect to certain controversies theretofore existing between them (litigation having been dismissed for lack of jurisdiction by this Court on November 10, 1941) *Chase National Bank* v. *Indianapolis Gas Co.*, (314 U. S. 63) (R. 143). The Plan was designated and referred to in all communications to the bondholders, and in all of the Gas Company records, as an "Offer and Plan of Settlement" (R. 241).

The Plan provided, in essence, for the following:

(1) The Gas Company and the City would exchange general releases.

(2) The Gas Company would sell to the City all of its properties, without warranty as to the mortgage, for the sum of $9,694,575.20.

(3) Each bondholder who accepted the Plan by surrendering his bonds and interest coupons for cancellation, would receive the principal of his bond plus 2% interest for the past six years. A similar amount would be deposited in escrow for all bondholders who did not accept the Plan.

(4) The Gas Company, after payment of certain expenses, would distribute to its stockholders the balance of the purchase price at the rate of $39 per share (amounting to approximately $1,500,000).

The Plan further provided that it would be consummated if accepted, not by a majority of the bondholders, but "by the holders of such portion of the outstanding bonds as may, in the judgment of the City, render the consummation of the Offer and Plan of Settlement practicable" (R. 243).

Neither the provisions of the Plan nor any communication by the Gas Company to its bondholders set forth that the non-assenting bondholders' rights against the obligor would be abridged or destroyed by the consummation of the Plan. The Gas Company refused to answer bondholders' specific inquiry on this point (R. 147-150). The bondholders were also refused a bondholder's list in order to communicate with each other with respect to the Offer and Plan of Settlement (R. 151). The first time the Gas Company asserted that the Offer and Plan of Settlement was intended as a plan or scheme of reorganization under the mortgage provision or that the rights of non-assenting bondholders against the obligor would be destroyed by the consummation of the Plan, was after these actions were instituted.

Upon consummation of the Plan, the Gas Company turned over to the City all of its properties. The mortgage, however, "still continues in full force as security for any and all rights which any holder of said bonds or coupons may have by virtue of his ownership thereof" (Gas Co. Answer R. 19). The Gas Company agreed with the City to effect its dissolution as soon as possible, and the distribution of its assets to its stockholders was designated as "liquidating dividends".

Rulings of the Courts Below.

The District Court directed judgment against the petitioners. It wrote no opinion and for its conclusions of law merely set forth that it found the law to be against the petitioners.

The Circuit Court of Appeals affirmed the judgment of the District Court. In its opinion, the Circuit Court set forth that Article VII of the mortgage provided that whatever action might be taken to secure payment of the bonds and coupons was subject to the control of the majority bondholders. The Court stated that the cases of *Sage* v. *Central Co.*, 99 U. S. 334, and *Elwell, Trustee* v. *Fosdick*, 134 U. S. 500, presented analogous situations and that in the light of those decisions the petitioners were bound by the action of the majority of the bondholders in accepting the Plan.

A petition for rehearing was denied by the Circuit Court of Appeals.

Questions Presented.

1. Whether the right conferred in a mortgage upon the majority bondholders to control the actions of the Trustee with respect to the enforcement of the lien of the security and in the event of such proceedings by the Trustee, to agree upon a plan of reorganization binding upon the minority bondholders, may be extended by implication to authorize the majority bondholders to abridge the rights of the minority on their bonds against the obligor by whatever action might be taken by the majority bondholders?

2. Where a mortgage does not, expressly or by necessary implication, authorize the majority bondholders to

abridge the rights of the minority bondholders against the obligor aside from the mortgage security, are the minority bondholders bound by the action of the majority in accepting an extra-judicial plan which involves neither the action of the Trustees nor the mortgage security?

3. Are non-assenting bondholders deprived of their property without due process of law when their rights against the obligor are held to be destroyed by an extra-judicial plan, which plan does not under any fair construction provide that non-assenting bondholders will be bound thereby, and where reasonable opportunity to protect their interests was denied to non-assenting bondholders through the concealment by the obligor of any purpose or effect of the Plan to bind non-assenters?

Reasons for Granting the Writ.

1. The decision of the Circuit Court of Appeals for the Seventh Circuit is in conflict with the applicable decision of the Circuit Court for the Eastern District of Virginia in *Manning* v. *Norfolk Southern R. R. Co.*, 29 Fed. 838, which held that the provisions of a mortgage authorizing majority bondholders to waive a default in interest could not be extended by implication to bar the non-assenting bondholder's right to recover such interest from the obligor.

2. The decision of the Circuit Court of Appeals in the instant case is in conflict with the weight of authority governing the construction of mortgage provisions authorizing control by majority bondholders over the minority. The decisions uniformly hold that such mortgage provisions are to be strictly construed in favor of the minority and that the rights of the minority bond-

holders against the obligor are not to be destroyed or abridged by action of the majority unless the mortgage contains explicit authorization therefor. (*Farmers Loan & Trust Co.* v. *Chicago & A. R. Co.*, Circuit Court, Seventh Circuit, 27 Fed. 167; *Mayo* v. *Fitchburg & L. St. R. Co.*, 269 Mass. 118, 168 N. E. 405; *Meissner* v. *Ogden L. & I. R. Co.*, 65 Utah 1, 233 P. 569; *McClelland* v. *Norfolk S. R. Co.*, 110 N. Y. 469, 18 N. E. 237.)

3. The question of construction of mortgage provisions authorizing the majority bondholders to control the minority is a matter of vital public interest. Numerous mortgages securing bonds sold to the general public contain provisions for majority control with respect to the actions of the trustee and the disposition of the mortgage security. If such limited provisions for majority control are to be extended by broad implication to include the right of the majority to control the minority in whatever actions might be taken to secure payment of the bonds and coupons, the rights of bondholders would be substantially diminished. The obligation contained in their bonds would become uncertain and conditional, and the bonds would be rendered non-negotiable. The bondholders would also lose their right to judicial supervision of any plans affecting their interests, since apparently the standards of fairness required under judicial reorganizations do not apply to voluntary reorganizations. An obligor could, as was done in the instant case, provide for substantial payments to its stockholders at the same time that it refused to pay its bondholders the moneys due on their bonds and interest coupons.

4. The non-assenting bondholders herein have been deprived of their property without due process of law by the decision of the Circuit Court, holding that they are

bound by the extra-judicial plan, regardless of the fact that the plan does not expressly or by reasonable implication provide that it shall bind non-assenting bondholders, and regardless of the fact that the non-assenting bondholders were deprived through concealment by the obligor of the purpose and purported effect of the plan, of any reasonable opportunity to protect their rights.

Despite the earnest contentions of the petitioners in the Court below, that the plan by its terms constituted an offer binding only upon those who accepted the plan, the Circuit Court concerned itself only with the question of the authority of the majority bondholders to bind the minority. The Court stated in its opinion:

> "In the view we take of the instant case, the question for decision is whether the plan was authorized by the terms of the mortgage deed of trust. If it was, and if there was sufficient notice in the bonds to make them subject to the conditions in the deed of trust, the judgment of the District Court must be affirmed" (R. 482).

The Circuit Court also failed to pass directly upon the point presented by the petitioners that by reason of the concealment by the Gas Company of any purpose or effect of the plan to bind non-assenting bondholders, they were deprived of any reasonable opportunity to protect their rights by preventing the consummation of the plan. The Court in its opinion stated on this question:

> "Plaintiffs have also stressed the point that Article VII is inapplicable for the reason that the conditions precedent required by that Article did not exist at the time of the offer and plan of settlement, and that the plan was neither framed nor submitted

as a plan or scheme of reorganization. These we have considered, but they do not change the conclusions we have reached and because of the views we have already expressed, they need not be discussed" (R. 485).

It is apparent that the Circuit Court deemed the provisions of the plan and the method of its presentation to bondholders, legally immaterial in view of its finding that the mortgage contained authority for the majority bondholders to bind the minority to whatever action might be taken. But the undeniable fact is that the authority *per se* could not destroy the rights of the minority. Only a plan which expressly or by reasonable implication provided for such destruction of the minority's rights could do so. And this question the Court did not pass upon.

Petitioners submit that these cases show a flagrant violation of the fundamental rights of bondholders. The Court has held that the petitioners' rights against their obligor have been cut off despite the clear showing that the plan by its terms does not so provide and despite the deprivation of any reasonable opportunity to bondholders to protect their interests.

The decisions herein vitally affect the public interest. The approval by the Circuit Court of the method adopted by the Gas Co. will undoubtedly constitute an encouraging precedent for numerous other obligors to whose advantage it will be to destroy their obligations without judicial supervision and without effective opposition by the individual bondholders.

Conclusion.

For the reasons hereinabove set forth, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

Daniel S. Gillmor, Henry H. Abrams and Pyramid Commercial Corporation,

By: Frank E. Karelsen, Jr.,
Donald L. Smith,
Walter Myers, Jr.,
Paul E. Kern,

Counsel for Petitioners.

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—against—

THE INDIANAPOLIS GAS COMPANY and CITY OF INDIANAPOLIS.

BRIEF IN SUPPORT OF PETITION.

Opinions Below.

No opinion was rendered by the United States District Court for the Southern District of Indiana.

The opinion of Circuit Court of Appeals for the Seventh Circuit (per Circuit Court Judge Kerner) has not yet been officially reported. It appears in its original form at page 413, and in its amended form at page 478, of the record.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, c. 229. The judgments of the Circuit

Court of Appeals sought to be reviewed herein were entered on June 10, 1943. A timely petition for rehearing was denied by the Circuit Court of Appeals on August 2, 1943.

Statement of Fact.

The statement of facts and questions presented are set forth in the petition.

Argument.

POINT I.

The decision of the Circuit Court herein is in conflict with the decision of the Circuit Court for the Eastern District of Virginia.

The Circuit Court has ruled that the mortgage involved herein provides "that whatever action might be taken to secure payment of the bonds and coupons should be subject to the control of the holders of a majority" of the bonds.

The mortgage itself, however, contains no language which expressly, or by necessary implication, confers such broad authority of control upon the majority bondholders.

The only provisions in the mortgage for majority control are set forth in Article VII. This article consists of two paragraphs which deal with the mortgage security. Under the first paragraph, the majority bondholders are authorized to control the action of the trustees for the enforcement of the lien of the security. Under the second paragraph, connected with the first in its subject matter and by the conjunctive "and", the majority bondholders are

authorized, in the event of any proceeding by the trustees with respect to the mortgage security, to agree upon a binding plan or scheme of reorganization.

Upon the basis of the grant of these clearly limited powers of control to the majority bondholders, the Circuit Court has concluded that the mortgage herein provides for the right of the majority to control the minority bondholders by any action, including a plan which involves neither the mortgage security nor the action of the trustee and which does not constitute a plan of reorganization.

This broad construction of the provisions of the mortgage with respect to majority control over the minority, and the consequent holding that the non-assenting bondholders are bound by the extra-judicial plan accepted by the majority, is in direct conflict with the ruling of the Circuit Court for the Eastern District of Virginia in *Manning* v. *Norfolk & Southern R. R. Co.*, 29 Fed. 838.

In the *Manning* case the mortgage expressly provided that a majority of the bondholders could instruct the trustee to waive a default in interest. Pursuant to such instruction by the majority bondholders, the trustee did waive a default in interest for five years. The Circuit Court for the Eastern District of Virginia, nevertheless, upheld the right of a non-assenting bondholder to recover the interest from the obligor. The Court ruled that the common law right to recover interest upon the bond is of too high a character to be taken away by implications. The Court stated (p. 839):

> "The mortgage was given for the purpose of securing the payment of the bonds. It contains various provisions looking to the protection of the property of the company which it covers from undue sacrifice.

> It contains no provision which positively, and none, I think, which impliedly, takes away from a holder of coupons, who has taken no part in instructing the trustee as provided by the terms of the mortgage, his right of action upon them at common law."

The decision of the Circuit Court in the instant cases is in direct conflict with the decision of the Circuit Court for the Eastern District of Virginia upon the governing principles of construction of mortgage provisions with respect to the right of the majority bondholders to control the minority.

POINT II.

The decision of the Circuit Court herein holding that minority bondholders are bound by whatever action is taken by the majority when only limited authority is granted to the majority by the mortgage, is in conflict with the weight of authority.

In *Farmers Loan & Trust Co.* v. *Chicago & A. Ry. Co.*, 27 Fed. 146, at p. 153, the same Circuit Court which rendered the decision herein, stated:

> "The right which is asserted by the majority must be found in plain and explicit terms in the mortgage or it will not be recognized. It cannot exist by mere implication."

The rule thus tersely stated by the Circuit Court for the Seventh Circuit represents the overwhelming weight of authority governing the construction of mortgage provisions pertaining to the right of majority bondholders to bind the minority.

Thus, in *Mayo* v. *Fitchburg & L. St. R. Co.*, 269 Mass. 118, 168 N. E. 405, the Court held that provisions in a mortgage authorizing the majority bondholders to waive a default did not include the right of the majority bondholders to bar a non-assenting bondholder from recovering on his bond. The Court pointed out that there was "nothing in the bond which makes the right of the holder contingent on the action of the majority of holders of other bonds of the series, and nothing in the trust agreement which deals with the rights of individual holders, except as against the security" (p. 121).

In *McClelland* v. *Norfolk S. R. Co.*, 110 N. Y. 469, the New York Court of Appeals held that mortgage provisions authorizing the majority bondholders to extend the time of payment upon a default, did not include the right of the majority bondholders to take such action in anticipation of the default.

In *Toler* v. *East Tenn. V. & G. R. Co.* (Cir. Ct. E. D. Tenn.), 67 Fed. 168, the Court held that mortgage provisions authorizing majority control over the right of the trustee to sell the mortgaged property would not be extended by implication to permit the majority bondholders to control the action of the trustee in foreclosure proceedings.

See also:

Meissner v. *Odgen L. & I. R. Co.*, 65 Utah 1;
Manning v. *Norfolk & Southern R. R. Co.*, 29 Fed. 838;
Poage v. *Cooperative Publishing Co.*, 57 Idaho 561, 66 P. (2d) 1119;
Bulova v. *Thermoid Co.*, 114 N. J. Law 205, 176 A. 596.

We know of no reported decision which has extended by implication the limited rights of control granted to majority bondholders under a mortgage to include "whatever action might be taken to secure payment of the bonds and coupons", as the Circuit Court herein has done. Nor do the cases cited by the Circuit Court of Appeals in its opinion tend to support the Circuit Court's ruling in this respect.

In *Sage* v. *Central Co.*, 99 U. S. 334, this Court upheld the right of the majority bondholders to control the disposition of the mortgage security pursuant to an express provision therefor in the mortgage. Similarly, in *Elwell, Trustee* v. *Fosdick*, 134 U. S. 500, this Court upheld the right of the majority bondholders, pursuant to the mortgage provision, to control the action of the trustee with respect to a foreclosure action.

We do not contend that mortgage provisions which expressly, or by necessary implication, confer upon the majority bondholders the power of control over the minority, are to be disregarded. We do contend, however, that there is no basis, in law or in equity, for the grant, through broad construction and implication, of absolute power to the majority bondholders to control the minority in "whatever action might be taken to secure the payment of the bonds and coupons".

POINT III.

The non-assenting bondholders have been deprived of their property without due process of law since the plan does not expressly or impliedly provide that their rights against the obligor shall be destroyed by the consummation of the plant, and even if it did, no reasonable opportunity was afforded to non-assenting bondholders to protect their rights by preventing the consummation of the plan.

The plan submitted by the Gas Company to its bondholders does not by any reasonable construction provide that non-assenting bondholders will be bound thereby. There is no express statement in the plan (or in the communications which accompanied the plan) to such effect and the provisions of the plan refute any such construction.

The plan is designated as an offer. It was proposed by the obligor and the bondholders took no part in the preparation or submission of the plan. The purpose of the plan is expressly stated to be for the settlement of controversies with the City (R. 291).

The plan provides for the sale, without warranty as to the mortgage, of the Gas Company properties. It does not provide for the release of the bondholders' rights in the mortgage security. The Gas Company admitted that the mortgage security still continues for all bondholders who have not accepted the plan (R. 19).

The consummation of the plan was not made dependent upon the action of a majority of the bondholders. It provided that the plan would be consummated when accepted by holders of such portion of the bonds, as the City decided would render the plan practicable (R. 293).

In the light of these provisions of the plan and in the

absence of any express statement or necessary implication to the contrary in the plan, or in the communications with respect to the plan, it is inconceivable to us, that the plan could be construed other than as an offer binding only upon those who accepted it. There is no justification for the conclusion that it bound all non-assenting bondholders.

Even if the plan could be construed as binding upon all bondholders, the actions of the Gas Company in connection with the plan should preclude it from any claim that its obligations to its bondholders have been destroyed by the consummation of the plan. The Gas Company's refusal to inform the bondholders that the consummation of the plan would bind non-assenters prevented them from taking any steps to defeat the plan. They were deprived of the opportunity to communicate with their fellow bondholders. They were misled into inaction when they could have instituted a judicial reorganization of the Gas Company, which would have guaranteed to them payment in full before the distribution of $39 a share to stockholders. They could have compelled the Trustee to institute foreclosure proceedings.

Under all of these facts, the holding by the Circuit Court herein which did not pass upon the questions thus presented, constitutes a deprivation of petitioners' rights without due process, and should be reviewed by this Court.

Conclusion.

We respectfully submit that the ruling made by the Circuit Court in the instant cases urgently requires review by this Court in view of the numerous questions involved which vitally affect the public interest. The broad, unprecedented construction by the Circuit Court of the rights of majority bondholders, as provided in the

mortgage, threatens not only the negotiability of numerous bonds sold in the open market, but also paves the way for a general recourse by obligors to voluntary plans of reorganization with their consequent lack of judicial supervision for protection of minorities. Numerous obligors will thus be able to enrich their stockholders at the expense of their bondholders, as the Gas Company herein has accomplished under the provisions of a plan which reduced the obligations on the bonds in order to pay stockholders the substantial sum of $39 per share.

The method adopted by the Gas Company herein also presents a threat to the rights of minorities in the precedent that it establishes for the destruction of bondholders' rights through prevention of any reasonable opportunity to the bondholders to protect such rights.

We respectfully submit that the ruling of the Circuit Court herein, and the detrimental effect to the public interest which must inevitably follow from such a ruling, warrants a review by this Court.

We respectfully submit, therefore, that the instant petition for a writ of certiorari should be granted.

Respectfully submitted,

FRANK E. KARELSEN, JR.,
DONALD L. SMITH,
WALTER MYERS, JR.,
PAUL E. KERN,
Counsel for Petitioners.

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BRIEF OF CITY OF INDIANAPOLIS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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BRIEF OF CITY OF INDIANAPOLIS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

These actions were originally commenced by each of the three petitioners against respondent, The Indianapolis Gas Company, in the United States District Court.

Defendant, Indianapolis Gas Company, filed a third-party complaint against respondent, City of Indianapolis, but the petitioners did not plead over against the third-party-defendant and have never sought to recover any judgment against it.

The cases were consolidated for trial in the District Court which made detailed Findings of Fact in each of the

cases (R. 228-255, 329-330, 393-397). Separate judgments were entered in favor of both defendants from which judgments petitioners prosecuted appeals to the Circuit Court of Appeals for the Seventh Circuit. The cases were there consolidated for hearing and disposition and the judgment of the lower court was affirmed. The amended opinion of the Circuit Court of Appeals is found at pages 478 to 496 of the record.

STATEMENT OF FACTS

The accuracy of the Findings of Fact of the District Court is not challenged by respondents, except that they claim that any plan of reorganization which makes provi sion for any payment to stockholders without payment in full of interest to bondholders is necessarily unfair.

It was stipulated in the District Court, "that prior to the time plaintiffs, and each of them purchased their respective bonds, they had notice of the litigation affecting said bonds, including institution of the suit of Chase National Bank against the Indianapolis Gas Company, et al., in this Court, and notice that the Indianapolis Gas Company was, because of such litigation, unable to pay said coupons as they respectively matured *and each plaintiff when it purchased said bonds and coupons had notice of their dishonor.*" (R. 400-401.) (Our emphasis.)

On May 1, 1942, after years of protracted litigation, a large majority of the bondholders of Indianapolis Gas agreed upon a plan or scheme of reorganization, the details of which are set out in petitioners' brief. The stockholders of Indianapolis Gas likewise approved the bondholders' plan.

In pursuance of that plan, the property of Indianapolis Gas was transferred to the City of Indianapolis for a con-

sideration in excess of $9,500,000. As of October 31, 1942, the holders of 83.7% of the bonds and of 98% of the stock had approved the plan.

(Stipulation R. 91-94.)

The bonds owned by the named respondents in these cases aggregate $63,000, or less than 1% of the total issue.

(Stipulation, R. 87 to 88.)

In 1937, the City of Indianapolis commenced an action in the Marion Superior Court (which was taken on change of venue to the Boone Circuit Court), seeking a declaratory judgment that the ninety-nine year lease between Indianapolis Gas and Citizens Gas was unenforceable against the City. That case was pending and was about to be tried when the plan of settlement was adopted (R. 92 —testimony of William R. Higgins, R. 60-61).

If the decision in that case had been adverse to Indianapolis Gas the consequences would have been disastrous to it.

The property of Indianapolis Gas was not worth to exceed $10,000,000. It had an outstanding mortgage debt of $6,881,000, and six years of defaulted interest amounting to $2,064,300. The cost of disconnecting the two properties would have been $1,000,000 and the cost of putting the plant of Indianapolis Gas in a situation to operate would have been $3,800,000. Because of its financial situation, it would have been impossible for Indianapolis Gas to have obtained the required capital to disconnect the properties and to make the necessary repairs and rehabilitations. (R. 68-69-81.)

In addition, Indianapolis Gas would have been at a de-

cided disadvantage in the sale of its coke and the production of its gas because the City owns the Milburn mine at which it produces at a relatively small cost a very high grade of coking coal. Indianapolis Gas owns no such mine and would have suffered a decided disadvantage in the production of its gas and sale of its coke. Indianapolis Gas had not operated its plant since 1913. Had it commenced operations it would have had the task of establishing records and routines, of employing skilled men for its key positions and re-establishing good will. Such work would have been both difficult and expensive. (R. 70-71.)

Interest had been in default on the bonds of Indianapolis Gas for six years and there was no prospect on May 1, 1942, that any interest would be paid thereon within another three years. Because of this protracted litigation the bonds had fluctuated widely in price from 1936 to 1941. The market price for such bonds with all coupons attached from October 1, 1936, to the respective dates set out below were as follows:

1936—low 69 —high 96⅜
1937—low 43 —high 82½
1938—low 49¼—high 84
1939—low 60½—high 88¾
1940—low 60 —high 99¾
1941—low 75 —high 92½

(R. 210-214.)

Neither of petitioners ever requested the Trustee to commence an action against Indianapolis Gas to recover unpaid interest coupons on such bonds (Stip. 20, R. 94.)

Respondent, City of Indianapolis, never made any agreement of any kind in connection with the payment of the bonds and coupons of Indianapolis Gas. (R. 60-81-94.)

The necessary portions of Indianapolis Gas plant which would have been required to be duplicated by the City on May 1, 1942, in order to serve all gas consumers in Indianapolis would have cost approximately $2,500,000 (R. 69).

The Chase suit which was commenced in June, 1936, was dismissed in pursuance of a mandate of the United States Supreme Court on November 10, 1941 (R. 91), but the default in the payment of coupons had been and was continuous.

Indianapolis Gas was reorganized on December 27, 1930, under the Indiana General Corporation Act of 1929 (Stip. R. 400).

The plan or scheme of reorganization was a plan or scheme which was submitted to the bondholders (Ex. 3, R. 138-145.) The letter of transmittal from Chase was dated March 12, 1942 (R. 138), and a letter from the President of Indianapolis Gas to the bondholders was dated March 16, 1942, both of them being substantially 1½ months before the consummation of the plan. A contract was entered into between the City of Indianapolis and Indianapolis Gas on April 23, 1942, providing for the transfer of the property of Indianapolis Gas to the City provided the terms of the contract were complied with (Ex. 18, R. 161). All the named bondholders in these cases had knowledge more than a month prior to the consummation of the plan that the plan was under consideration and that the Board of Directors of Indianapolis Gas had conditionally approved the plan (Exhibits 7 and 8, R. 147-150). The correspondence evidencing this knowledge is between Indianapolis Gas and Karelsen & Kaerlsen who were then attorneys for petitioners and are now attorneys of record for all petitioners. On May 1, 1942, Mr. Donald L. Smith, representing Sterling, Grace & Com-

pany, who in turn represent $78,000 of bondholders who declined to give their names, the dates of purchase or the prices paid therefor, advised Chase and Indianapolis Gas not to make any payments to stockholders of Indianapolis Gas until the owners of the bonds had been paid in full with interest (R. 163-164). The record discloses no effort on the part of any of these bondholders to prevent the consummation of the plan, but only an effort to require that their bonds and coupons and interest on coupons be paid in full.

ARGUMENT

We discuss briefly petitioners' three reasons for the allowance of a writ to show:

1. That there are no questions in this case which should result in the exercise of this Court's jurisdiction to grant the writ; and

2. That the decision below is a correct one.

First. There is no conflict between the decision of the Circuit Court of Appeals for the Seventh Circuit and that of any other Circuit Court of Appeals within the meaning of Subdivision 5(a) of Rule 38 of this Court.

The case which is relied upon to show such a conflict is a decision of the former Circuit Court of the Eastern District of Virginia in *Manning v. Norfolk Southern Railroad Co.*, 29 F. 838 (1887).

An examination of that case demonstrates its inapplicability to the present one. There, there was an attempt to waive interest on coupons before maturity, whereas here, petitioners are not good faith purchasers for value, but bought the coupons sued on with full notice of their dishonor.

(a) But if there had been a conflict of decision between two Circuit Courts of Appeal, under the rule announced in *Erie Railroad v. Tompkins,* 304 U. S. 64, 82 L. Ed. 1188, such a conflict on questions controlled by State law is not in and of itself a reason for granting a writ of certiorari.

Ruhlin v. New York Life Insurance Co., 304 U. S. 202, 82 L. Ed. 1290.

(b) The question here involved is purely one of local law i. e., the construction of the provisions of a mortgage.

Second. It is claimed that the writ should be granted because the decision of the Circuit Court of Appeals is in conflict with the weight of authority. It is not even claimed by petitioners that the decision of the Circuit Court of Appeals fails to follow the Indiana law and they do not even cite an Indiana case under this point.

Under the doctrine of *Erie Railroad v. Tompkins,* 304 U. S. 64, 82 L. Ed. 1188, it can make no difference what the law of other states or jurisdictions is provided the Indiana law has been followed by the Circuit Court of Appeals, which petitioners do not deny.

(a) The decision of the Circuit Court of Appeals is not, however, contrary to the weight of authority. There are two controlling cases decided by this Court which uphold voluntary plans of reorganization as against dissenting minorities.

Sage v. Central Railroad of Iowa, 99 U. S. 334, 25 L. Ed. 394;

Elwell, Trustee, v. Fosdick, 134 U. S. 500, 33 L. Ed. 998.

Third. It is now asserted *for the first time* that petitioners and other non-assenting bondholders have been deprived of their property without due process of law. Even if the claim had any merit it comes too late. No such claim was made in petitioners' complaint filed in the District Court nor was it asserted at the trial on the merits before the District Court nor was it assigned as error in the Circuit Court

of Appeals, nor even in petitioners' application for a rehearing.

A claim of the denial of a constitutional right made for the first time on application for a writ of certiorari comes too late.

New York, ex rel, Cohn v. Graves, 300 U. S. 308, 81 L. Ed. 666;
Herndon v. Georgia, 295 U. S. 441, 79 L. Ed. 1530;
Loeher v. Schroeder, 149 U. S. 580, 37 L. Ed. 856.

4. The decision of the Circuit Court of Appeals was obviously right.

Where a majority in interest of corporate bondholders adopt a plan or scheme of reorganization in pursuance of authority so to do contained in a trust indenture, all bondholders are bound by such plan. The provisions of Subdivision VII of the Trust Indenture in this case confer ample authority upon the majority to adopt such a plan or scheme and, when adopted, it binds all bondholders.

Elwell v. Fosdick, 134 U. S. 500, 33 L. Ed. 998;
Gates v. Boston, etc., Co., 53 Conn. 333, 5 Atl. 695;
Cowell v. City Water Supply Co., 105 N. W. (Ia.) 1016;
Phipps v. Chicago, etc., Co., 284 F. 945, 28 A.L.R. 1184, and particularly at page 1202;
Allen v. Moline Plow Co. (C.C.A.), 14 F. (2) 912, 913, 917;
Chicago, etc., Co. v. Fosdick, 106 U. S. 47, 27 L. Ed. 47;
Sage v. Central R. R. Co., 99 U. S. 334, 25 L. Ed. 394, 396, 397;

Florida v. National Bank of Jefferson, etc., Life Ins. Co., 123 Fla. 525, 167 So. 378, 108 A.L.R. 77, 84, 85, 86;

Pacific States, etc., Co. v. Hollywood, etc., 11 Cal. App. (2) 56, 52 Pac. (2) 1014;

Seibert v. Minneapolis, etc., Co., 52 Minn. 148, 53 N. W. 1134;

People v. Title & Mortgage Co., 264 N. Y. 69, 190 N. E. 153;

Moody v. Pacific, etc., Co., 174 Wash. 256, 24 Pac. (2) 609.

(a) The relation of the bondholders under a corporate mortgage on a public utility property is a peculiar one and the absolute right of control of such bondholders is limited not only by the express provision of the bonds and mortgage, but also in great measure by the nature and character of the security.

Canada Southern Railroad Co. v. Gebhard, 109 U. S. 534, 537;

Shaw v. Railroad Co., 100 U. S. 605, 25 L. Ed. 757;

Gates v. Boston Co., 53 Conn. 333, 5 Atl. 695.

(b) One of evils which the agreement for a plan or scheme of reorganization was designed to prevent is that frequently small minorities of bondholders resist arrangements for a fair adjustment of corporate obligations, unless they are accorded superior advantages over their fellow bondholders or are paid in full. No substantial reasons appear for permitting speculators to overthrow a plan of reorganization agreed to by almost 84% of the bondholders of Indianapolis Gas.

Sage v. Central R. R. Co. of Iowa, 99 U. S. 334, 25 L. Ed. 394;

Elwell, Trustee, v. Fosdick, 134 U. S. 500, 33 L. Ed. 998;

Palmer v. Bankers Trust Co., 12 F. (2) 747 (C.C. A. 8).

(c) All the named petitioners knew substantially 1½ months before the plan or scheme of reorganization was consummated that it was under consideration and were advised in a letter dated March 27, 1942, about five weeks before the consummation of the plan that it had been tentatively approved by the Board of Directors of Indianapolis Gas. They made no effort whatever to prevent the consummation of the plan, or the transfer of the property of Indianapolis Gas to the City and their inaction should have weight in preventing them from obtaining preferred treatment at this time.

The respondent, the City of Indianapolis, respectfully submits that petitioners' application for a writ of certiorari should be denied.

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(2)

No. 466-468

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

DANIEL S. GILLMOR, HENRY H. ABRAMS, AND PYRAMID COMMERCIAL CORPORATION, Suing on Its Own Behalf and on Behalf of All Other Owners and Holders of First Consolidated Mortgage 5% Gold Bonds, etc.,

Petitioners,

v.

THE INDIANAPOLIS GAS COMPANY AND CITY OF INDIANAPOLIS,

Respondents.

RESPONDENT INDIANAPOLIS GAS COMPANY'S BRIEF OPPOSING THE PETITION FOR A WRIT OF CERTIORAI IN EACH CASE

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TABLE OF CASES CITED

Abbreviation Used

"R." should be read: "Record, page ....."

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Petitioners,

v.

THE INDIANAPOLIS GAS COMPANY AND CITY OF INDIANAPOLIS,
Respondents.

No. ———

RESPONDENT INDIANAPOLIS GAS COMPANY'S BRIEF OPPOSING THE PETITION FOR A WRIT OF CERTIORAI IN EACH CASE

Three appeals from identical judgments of the District Court in three actions at law which were consolidated for purposes of trial and were tried together, were all taken to the Circuit Court of Appeals for the Seventh Circuit on a single Record, where they were heard together, and where each Judgment was Affirmed (R. 421, 422, 423).

Only a single Petition and supporting Brief have been filed in this Supreme Court by all the Petitioners in their

combined cause, and Defendant-Appellee The Indianapolis Gas Company is filing this one Brief in opposition thereto.

The Opinion of the said Circuit Court of Appeals (R. 478 to 486) is reported in 136 Fed. (2d) 925 (Advance Sheets, September 13, 1943.)

CORRECTED STATEMENT OF THE FACTS

The Opinion of the Circuit Court of Appeals (R. 478-486, 136 Fed. (2d) 925) in these three causes, of which Petitioners now ask a review, sets out the facts in the three or four opening pages quite fully and accurately. But as many of these facts are not included in the Statement of the Case made by Petitioners on their pages 2 to 5, we call attention to facts they have omitted.

Each of the three suits was an action at law by one of the Petitioners to recover money alleged to be due on a private contract, as interest on mortgage bonds issued by this Respondent (R. 2; and 269; and 335). Jurisdiction was based in each case solely on alleged Diversity of Citizenship (*Ibid;* Findings No. 1 at each of R. 228, 329 and 393; Findings Nos. 2, 3 and 4, R. 228-229).

The Chase National Bank (of New York) is and long has been the successor and sole surviving Trustee for the bondholders under the Mortgage Deed of Trust that secured said bonds, which covered all of the property of this Respondent, a Gas Plant in Indianapolis. Citizens Gas Company had been organized to build and acquire a competing Gas Plant in Indianapolis, and was bound at a time and under conditions fixed by contracts to transfer its property to the City of Indianapolis as a Public Chari-

table Trust, but the two plants were in competition in large parts of their business.

In 1913 the Indianapolis Gas Company conveyed by way of lease for 99 years, all its Gas Plant property to Citizens Gas Company, which amalgamated the two plants and operated them as one until 1935, when it conveyed its own property to the City of Indianapolis and turned over to the City the two combined plants, which the City has since operated.

The lease (R. 108-137) had bound Citizens Gas Company to pay as rent all the obligations of the lessor, including these interest coupons as they should mature (R. 126-127), and at the expiration of the lease to restore and turn back the demised property in condition for separate use (R. 129-130). But when the City took them over it denied the power of Citizens Gas Company as "primary trustee" of a Public Charitable Trust to bind by such contracts its property or the successor trustee, and ceased to pay any rent; which left this Respondent without property or income. On March 2, 1936, these two Respondents executed a "stand-still" agreement which provided that beginning after April 1, 1936, all sums accruing to be paid under the terms of the lease should be paid to a bank, "in escrow" to await a determination, by litigation or agreement, as to any liability of the City under the lease or otherwise, and in what sum, if any (R. 235, 236, Findings 9, 11). On June 6, 1936, said Trustee, Chase National Bank, commenced an action to establish liability of the City under the lease and to recover from Respondent Indianapolis Gas Company on such of these interest coupons (held by assignors of Petitioners and others) as had then matured. The District Court decided the lease did

not bind the City, and the Circuit Court of Appeals held that it did (113 F. (2d) 217), and this Supreme Court adjudged there had been no jurisdiction (314 U. S. 63) and ordered the action dismissed (R. 235-236, Finding 12). In the meantime a suit raising similar questions had been commenced in 1937 in a State Court, which upon the dismissal of the Federal suit, began to draw nearer a trial (R. 236, Finding 13). In March, 1942, nobody had received any interest for six years (since April 1, 1936), the case involved questions on which the District Court and Circuit Court of Appeals had differed that had not been directly decided by a Court of last resort in Indiana, and expenses of more than $300,000 had been incurred in litigation. The mortgage debt consisted of $6,881,000 of bonds plus $2,064,300 of unpaid interest coupons (total $8,945,300), and if the property were taken back without being restored for separate operation as stipulated in the (contested) lease, it would cost $4,800,000 to separate the two plants and get the leased property in condition for separate operation, while this respondent Company had no money and no further credit, and the value of the property was less than $10,000,000. And any purchaser must operate the mortgaged plant in competition with the City, which for $2,500,000 could extend its plant to serve the entire city (R. 69, Stip.).

Under these difficulties the bonds were excluded from sale on the New York Curb Exchange in September, 1936, except as dealt in "flat" with all the defaulted interest coupons attached, maturing October 1, 1936, and thereafter, and the selling value was depressed.

Petitioners Gillmor and Abrams acquired their bonds at a heavy discount (R. 88), and even Pyramid Commercial Corporation, which did not buy until May 25, 1942,

after five-sixths of all the bonds had been surrendered and destroyed, bought at a discount of more than $3,000 (R. 89).

Each petitioner bought into this matter with "notice of (said) litigation affecting the bonds, and notice that the Gas Company" (this respondent) "was because of such litigation unable to pay the coupons as they respectively matured, and * * * notice of their dishonor" (R. 400-401, Stip. 2).

Besides "Article VII" the mortgage contained fourteen other Articles that fill ten printed pages (R. 303-313) of the record, besides six pages (R. 297-302) of general provisions; and in these there are repeated references to a "default that may have occurred and continued" for six months, and to the discretion of the trustees, and the "control of the holders of a majority in amount of said bonds" after such a default, with which Article VII had to be construed.

Copies of the Plan were sent to all the owners of bonds at that time, and these Counsel wrote to this respondent about it repeatedly more than a month before it was put in execution (R. 147-150, Exhibits No. 7, 9.) But Pyramid Commercial Corporation did not own any bonds until nearly four weeks after the Plan was executed (R. 394).

ARGUMENT

QUESTIONS PRESENTED

1. Whether or not this Court will call up a question as to the proper construction under the law of Indiana of the provisions of a private contract consisting of a bond three pages long (R. 297-299) and a mortgage securing it and referred to in it, sixteen pages long (R. 295-313), where the only question is one of the right of speculators who purchased paper they knew was in default to make a larger profit on the investment?

2. Whether a contract consisting of a bond, coupons attached and a mortgage, referring across to each other, which expressly authorized the owners of a "majority in amount" to control what should be done toward enforcing payment after a default in paying interest should "have continued six months," governed wholly by the local law of a State, has been properly construed by the District Court and Circuit Court of Appeals in succession?

3. Where action was expressly authorized by the contract consisting of a bond with attached coupons and a mortgage securing it, and Petitioners who sued at law to collect interest alleged to be due did not suggest any lack of "due process" down to and including their petition for rehearing in the Circuit Court of Appeals, whether they can obtain certiorari from this Court to enable them for the first time to raise that point on the construction of a private contract under the local law of a State.

REASONS FOR DENYING THE WRIT

1. The decision in *Manning v. Norfolk Southern R. R. Co.* (1887), 29 Fed. 838, only determined what was the "common law" in force in Virginia with regard to the action of bondholders, where the mortgage only gave the majority of bondholders power to instruct the trustees to waive a default, and the bondholders had adopted a resolution before any default had occurred to waive the payment of interest for the next five years; and there was no grant of authority or attempted exercise thereof, to "reorganize" because of continuing defaults affecting the investment as in the case at bar. It has no effect as against this construction by another Court of a different contract, under the laws of Indiana in force 55 years later.

> *Ruhlin v. New York Life Insurance Co.* (1938), 304 U. S. 202, 204-206, 82 L. Ed. 1290, 1291-1292.

2. So far from being "in conflict with the weight of authority governing mortgage provisions" such as this (as Petitioners say), none of the cases they cite hold that under such a bond and mortgage contract as we have here, where the majority of bondholders acted for the benefit of all after a default actually had occurred, their action was unlawful; but on the contrary, a long list of cases decided under the laws of jurisdictions other than Indiana have held that under the common law and the statutes there in force, such provisions of a contract in the bonds and mortgages, giving a majority in amount of the bondholders control of proceedings to enforce or adjust a claim after continuance of a default for six months, with full authority in the matter, are lawful and commendable.

Chicago, etc., Co. v. Fosdick, 106 U. S. 47, 27 L. Ed. 47;

Crossthwaite v. Moline Plow Co., 298 Fed. 466, 468;

Phipps v. Chicago, etc., Co., 284 Fed. 945, 953-4, 28 A. L. R. 1184, and note, page 202;

Cowell v. City Water Supply Co., 130 Iowa 671, 105 N. W. 1016;

Florida National Bank, etc. v. Life Ins. Co., 123 Fla. 525, 167 So. 378;

Moody v. Pacific, etc., Co., 174 Wash. 256, 24 Pac. (2d) 609;

Seibert v. Minneapolis, etc., Co., 52 Minn. 148, 43 N. W. 1134;

Sneath v. Valley Gold, 1 Ch. (Eng.) 477, 2 Rev. Rep. 292, 68 L. T. N. S. 602 C. A.

3. These Petitioners having all waited until in May, 1942, before bringing suit on interest coupons that had been continuously in default since October 1, 1936, are in no position to complain of the "fairness" of a provision written into a contract executed in 1902, consisting of a mortgage and the bonds and coupons it secured which gave the majority in amount of the bondholders power by a reorganization to effect a settlement of the debt after it should have become six months in default, where petitioners did not acquire their bonds until they were in default several times six months, and until they had depreciated in selling value in consequence. One's constitutional rights to due process of law are personal to himself and may be waived by maintaining a suit with relation to his rights for years and never suggesting that he has them till after affirmance of a judgment against him on appeal.

Jones v. Oklahoma City (C. C. A. 10), 78 F. (2d) 860, 861;
Booth Fisheries Co. v. Industrial Com. Wisconsin, 271 U. S. 208, 210, 70 L. Ed. 908, 910.

An answer setting up the provisions of this Mortgage and of the Bonds secured by it and referring to its provisions was filed in each of these cases, Gillmor, July 8 (R. 18); Abrams, July 15 (R. 276; Pyramid Com. Corp. August 12 (R. 348), all in 1942. The trial was October 30, 1942 (R. 57), the Special Finding was made February 26, 1943, the case on appeal to the Circuit Court of Appeals was argued May 14, 1943 and decided June 10 (R. 412, 413), and the Petitioners filed an application for a rehearing July 10, 1943 (R. 423), which was denied August 2, 1943 (R. 477), after they had filed a reply brief thereon July 23d, 1943 (R. 467).

And not until this Petition for Writ of Certiorari was filed October 30, 1943 was the subject of being deprived of the Due Process of Law mentioned.

Respondent The Indianapolis Gas Company respectfully insists that the petition should be denied.

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(21)

Supreme Court of the United States

OCTOBER TERM, 1943.

Nos. 466, 467, 468.

DANIEL S. GILLMOR, HENRY H. ABRAMS and PYRAMID COMMERCIAL CORPORATION, suing on its own behalf and on behalf of all other owners and holders of First Consolidated Mortgage 5% Gold Bonds, etc.,

Petitioners,

—against—

THE INDIANAPOLIS GAS COMPANY and CITY OF INDIANAPOLIS.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI.

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THE INDIANAPOLIS GAS COMPANY and CITY OF INDIANAPOLIS.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI.

Neither respondent attempts to justify the payment of $39 per share to stockholders, while the bondholders are deprived of $240 in accrued interest on each bond. The price paid by the City for the Gas Company properties was sufficient to pay the bondholders' claims in full, and in addition almost $20 per share for stockholders, which figure approximated the market value of the stock (R. 165).

Yet the Gas Company arbitrarily determined to pay its stockholders $39 per share, or nearly twice the market value thereof, by reducing the bondholders' claims for accrued interest by 60%.

Under a judicial reorganization, the payment made in these cases to the stockholders, at the expense of the bondholders, would undoubtedly have been declared unfair and discriminatory (*Case* v. *Los Angeles Lumber Products Co.*, 308 U. S. 106; *Consolidated Rock Products Co.* v. *DuBois*, 312 U. S. 510).

Equally indefensible, we submit, is the attempt herein to avoid the standards of fairness required under a judicial reorganization by the contention that the majority bondholders have voluntarily agreed to compel the minority to accept the reduced amount provided for them under the plan.

Neither respondent has in its brief (nor has the Circuit Court in its opinion) pointed to a single fact or authority which controverts or impugns the validity of the propositions set forth in the petition and our main brief that (1) the majority bondholders had no power under the mortgage to modify or destroy the rights of the minority on their bonds against the obligor, and (2) the Offer and Plan of Settlement was framed, presented and consummated as an offer by the Gas Company, binding only upon the bondholders who accepted the plan.

POINT I.

The decision by the Circuit Court, holding that the majority bondholders had unlimited control over the minority, is opposed to the law of Indiana, as well as to the law of every other jurisdiction, and is completely without any justifiable basis.

The respondents contend that the decision of the Circuit Court should not be reviewed on the ground that the question of the rights of the minority bondholders is to be determined by Indiana law. The fact of the matter is, however, that there is no Indiana decision on the subject. The fact is also that the decision of the Circuit Court is directly opposed to every decision in every jurisdiction which has ruled on this question.

There is not a single case in any jurisdiction which holds, as the Circuit Court did herein, that where a mort-

gage provides for control by the majority bondholders over the action of the trustee and the disposition of the mortgage security, the majority may exercise unlimited control over the minority and destroy the rights of the minority on their bonds against the obligor.

The cases cited by the respondents do not support any such proposition. Those cases merely hold that the specific powers granted in a mortgage or by statute to the majority bondholders to control the trustee or the mortgage security, will be enforced by the courts. They do not, however, authorize the grant by judicial construction of unlimited power to the majority over the minority.

Indeed, in the very cases cited by the respondents (*Florida* v. *National Bank of Jefferson*, 123 Fla. 525, and *Siebert* v. *Minneapolis*, 52 Minn. 148), the Courts specifically recognized the universal rule requiring strict construction of the powers granted to the majority bondholders over the minority.

In *Sage* v. *Central R. R. Co.*, 99 U. S. 334, which the Circuit Court described as analogous, this Court, in upholding the power of the majority bondholders to control the disposition of the mortgaged property, pointed out:

> "The majority were empowered to direct the terms and conditions under which the new corporation should exist, and hold the property conveyed to it, as well as the limitations within which it might act. It is not intended that the majority could postpone the rights of any minority of the bondholders to those of other creditors, *or allow any interference with those rights.*" (Emphasis ours.)

The decision of the Circuit Court herein is opposed not only to every judicial precedent, but also to every other justifiable standard. The provisions for majority control

over the trustee and over the mortgage security are made for the purpose of protecting the common interests of all the bondholders. No reason appears, however, why the majority should have the power to control the minority's rights on their bonds, aside from the mortgage security and aside from any matter affecting the common interests of the bondholders. Such power in the majority bondholders would undoubtedly open the way to abuse of the rights of minorities. It should not, we submit, be assumed that bondholders have voluntarily agreed to substitute the protection of the majority for the protection of the courts, in the absence of specific language in the mortgage to such effect.

We respectfully submit that the decision of the Circuit Court is untenable under the law of Indiana and under the law of every other jurisdiction. It constitutes a serious threat to the rights of numerous other bondholders whose rights are secured by mortgages which, as in the instant cases, provide for majority bondholder control over the action of the trustee and the mortgage security.

POINT II.

The Offer and Plan of Settlement constituted an offer by the Gas Company to the individual bondholders and was neither intended, framed nor adopted as a bondholders' agreement binding upon the non-assenters.

The respondents offer no explanation for the undisputed facts herein which clearly and definitely establish that the Offer and Plan of Settlement was framed, presented and adopted as an offer made by the Gas Company to the individual bondholders, binding only upon those who accepted the offer. No explanation is given

for the designation of the plan as an offer; for the fact that neither the plan nor the communications with respect thereto contained any statement that non-assenting bondholders would be bound; for the provisions of the plan which were clearly inconsistent with any purpose or effect of the plan to bind non-assenters; or for the deliberate concealment by the Gas Company of any purpose or effect of the plan to bind non-assenters.

Nor do the respondents attempt to justify the failure of the Circuit Court to pass upon these facts in determining whether or not the Offer and Plan of Settlement constituted an agreement by the majority bondholders to bind the non-assenting bondholders. Instead, the respondents assert that we are not entitled to raise this question on this petition for certiorari.

Certainly, however, it could not have been anticipated that the Circuit Court would deem of no legal significance the facts showing that regardless of any authority in the majority bondholders, the Offer and Plan of Settlement was not intended to bind the non-assenters. It could not have been anticipated that the Circuit Court would deem immaterial the manner in which the Gas Company prevented the bondholders from protecting their interests, by concealing the presently claimed purpose and effect of the plan to bind non-assenters.

The respondents assert that the failure of the petitioners to make any effort to prevent the consummation of the plan during the two months which elapsed between the announcement of the plan and its consummation, should be accorded weight in considering the petitioners' rights. This inaction by the petitioners, however, was due to the successful concealment by the Gas Company, in the plan and in its communications to the bondholders, of any intent or purpose to bind non-assenters. The minority bondholders were given no indication that their

rights would be destroyed by the consummation of the plan. The sale to the City was made subject to the mortgage and it reasonably followed that the value of the security to the non-assenters would be enhanced by the reduction of the bonded indebtedness, through the cancellation and surrender of the bonds whose holders were willing to accept the offer.

It should also be pointed out that the petitioners do not oppose and never have opposed the sale of the Gas Company plants to the City. There is no element of interference with the rights of the public in this case. The petitioners are concerned only with the intra-corporate question of the right of the Gas Company to divert the bondholders' share of the proceeds of the sale to the stockholders.

Conclusion.

The rulings by the Circuit Court in these cases that majority bondholders may exercise unlimited control over the minority, even in the absence of any provision in the mortgage which, explicitly or by implication, confers such right upon the majority, and further that the rights of the minority against the obligor may be destroyed by action of the majority, regardless of the intent or purpose of such action or the manner in which such action was procured, involve matters of vital public importance and warrant a review by this Court.

We respectfully pray, therefore, that the petition for writs of certiorari herein be granted.

Respectfully submitted,

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